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SUPREME COURT, U. S.

No. 70-330

AUG 12 1971

E. ROBERT SEAVER

Supreme Court of the United States

SOUTHERN RAILWAY COMPANY, *Petitioner*,

v.

ROBERT D. TRAIGMAN, JR., *Respondent*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY OF PETITIONER SOUTHERN RAILWAY COMPANY

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August, 1971

TABLE OF CONTENTS

	Page
REPLY	1
CONCLUSION	5

TABLE OF AUTHORITIES

CASES:

Beard v. *Westmoreland*, 90 Ga. App. 632, 84 S.E. 2d 93 (1954)	4
Bradley v. *American Radiator and Standard Sanitary Corp.*, 6 F.R.D. 37 (S.D.N.Y. 1946)	3
Campbell County v. *Howard*, 133 Va. 19, 112 S.E. 876 (1922)	4
Ewing v. *National Airport Corp.*, 115 F.2d 859 (4th Cir. 1940)	3
Gilchrist v. *Harrah*, 45 Cal. App. 2d 154, 113 P.2d 712 (1941)	2
Noonan v. *Gilbert*, 68 F.2d 775 (D.C. Cir. 1934)	4
Old Dominion Transp. Co. v. *Hamilton*, 146 Va. 594, 131 S.E. 850 (1926)	2-3
Stanton v. *Embrey*, 93 U.S. 548 (1876)	4

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Respondent Troutman's counter-statement of the case, apart from its reinterpretations of settled facts,[1] is largely an effort to inject matters not pertinent to the questions presented for plenary review. The important point is that the evidentiary facts stated in the petition are nowhere directly controverted in Troutman's brief and, indeed, the critical facts set forth in the petition were drawn essentially from Troutman's own testimony. Pet. 4-5.

[1] These interpretations do not appear entirely consistent with one another. Notably, Troutman's brief paraphrases the testimony of a trial witness as affirming that the Justice Department's decision to adopt Southern's position in the Ohio litigation "was unaffected by any outside influence, including Mr. Troutman." Resp. Br. 5. A few pages later, Troutman's brief refers to the "successful results of the Ohio litigation, precipitated to a very large extent by Mr. Troutman's services . . . ." *Id.* 8-9.

1. The first question posed in Southern's petition requested plenary review of the lower courts' decision that compensation could be collected for the use of personal and political influence to gain an audience with a federal official. The petition showed that the language and rationale of leading cases of this Court appear to forbid on public policy grounds the enforcement of such compensation claims by federal courts. Pet. 9-11. The two lower federal courts which have previously spoken to this issue seem to have taken conflicting views of the relevant Supreme Court precedents. Pet. 11-12.

In conclusory terms, Troutman's brief repeatedly asserts that he did nothing sinister, underhanded or detrimental in the course of his activities. However, he does not deny that his access to the President, the very mainspring of his activities in this case, was made possible only by his personal and political relationship with the President. His generalities therefore do not meet the question posed here whether compensation can be collected for activities based upon use of that special relationship.

Troutman argues that the use of personal and political influence to procure an official audience has been upheld by two state court decisions. *Old Dominion Transp. Co.* v. *Hamilton,* 146 Va. 594, 131 S.E. 850 (1926); *Gilchrist* v. *Harrah,* 45 Cal. App.2d 154, 113 P.2d 712 (1941). While the two cases cited may be distinguished on several grounds, it is sufficient to note that both cases involved collection of compensation through *state* courts for attempts to procure action by *local* officials. Obviously the willingness of two states to adopt looser standards in such matters is no warrant whatever for a departure by the lower federal courts

from the stringent rules established by this Court for cases involving federal officials and federal interests.

The Troutman brief alleges that one of the two state cases—*Old Dominion*—has been "cited approvingly" in *Ewing* v. *National Airport Corp.*, 115 F.2d 859 (4th Cir. 1940), and *Bradley* v. *American Radiator and Standard Sanitary Corp.*, 6 F.R.D. 37 (S.D.N.Y. 1946). Although *Old Dominion* was in fact cited in both instances, neither federal decision cited it for the proposition relied on by Troutman, namely, that personal and political influence to obtain an official audience may be the basis for a court award of compensation.[2] In fact, in both federal cases the agreements involved were held unlawful and compensation was not allowed.

2. The second question posed by the petition was whether this Court's general rule barring "contingent" fees for procuring official federal action could be circumvented by awarding a "reasonable" fee measured importantly by success in obtaining the desired result. The petition cited decisions of this Court establishing the general rule together with a decision applying that rule to an arrangement avoiding the form but having the effect of a contingent fee. Pet. 13-16.

Significantly, Troutman does not challenge the general rule but instead describes as "technical" (Resp. Br. 16) the wrongly omitted instruction which would have prevented the jury from measuring Troutman's

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[2] *Ewing* cited *Old Dominion*, among other cases, to affirm the principle that "lobbying contracts" are unlawful, in certain circumstances, in state as well as in federal courts. 115 F.2d at 860. *Bradley* cited it as one of a line of cases illustrating the view taken by some courts regarding the legality of contingent fees for procuring government contracts; a line of cases for the contrary view was also cited and *Bradley* was ultimately disposed of on other grounds. 6 F.R.D. at 40.

fee by the successful result allegedly obtained, as the jury clearly did in this case.[3] Certainly the public policy underlying this Court's restrictions on contingent fees involves no "technical" matter. It is no less clear that the action of the courts below, which opens a major loophole in those restrictions, is deserving of review by this Court.

Indirectly, Troutman does attack the general rule by citing several cases to show that the District Court's charge on the measure of recovery was correct even though it omitted the critical instruction preventing an award based on the value of the "result." One of these cases, *Campbell County* v. *Howard*, 133 Va. 19, 112 S.E. 876 (1922), has some pertinence, since the District Court's charge on measure of recovery duplicates *Campbell's* language almost word for word.[4] However, the charge approved in *Campbell* included not only the language of the instruction given by the District Court but, in the immediately following sentence (133 Va. at 51, 112 S.E. at 885), included essentially the same language limiting reliance on the "result" which the District Court here failed to include although requested to do so. See Pet. 8.

Finally, Troutman disputes that "the evil inherent in the use of [a] contingent fee contract" can be pres-

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[3] Troutman's contention that this error in instructions was waived has been answered in the petition. Pet. 15. See generally *Noonan* v. *Gilbert*, 68 F.2d 775, 776 (D.C. Cir. 1934).

[4] Compare the charge given by the District Court (App. 780) with the statement approved in *Campbell* (133 Va. at 51, 112 S.E. at 885). The other two cases cited do not appear to be relevant. *Stanton* v. *Embrey*, 93 U.S. 548 (1876), concerned a question of admissibility of evidence in fixing an attorney's fee. Even more remote is *Beard* v. *Westmoreland*, 90 Ga. App. 632, 84 S.E.2d 93 (1954), which was a divorce case having no relation to proper standards of compensation for procuring federal action.

ent where no explicit agreement as to fee existed in advance. Resp. Br. 18. Yet the very incentive to misconduct which Troutman's brief attributes to contingent fees and which has led this Court to curtail their use where official federal action is at stake was no less inherent in the measure of recovery permitted by the District Court's instructions. An agent who contemplates a "reasonable fee" measured, in the words of Troutman's own testimony, "primarily on the result" (App. 427) is quite as susceptible to "the danger" posed "by hope of a reward contingent upon success and graduated by the value ensuing to the client" (Resp. Br. 18) as is an agent with an explicit contingent fee contract.

In conclusion, both of the questions set forth in the petition involve important issues of federal public policy appropriate for review in this Court. The questions are sharply posed in this case, because they are not only implicit in the facts but are presented by the very instructions of the District Court. The petition should be granted.

Respectfully submitted,

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